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IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of this Court, the American Farm Bureau Federation requests leave to file the accompanying brief as amicus curiae in support of the petition for a writ of certiorari. Consent for amicus participation was requested of all parties, but denied by the Intervenor-Respondent City of Bartlett.

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of the State of Illinois. Farm Bureau was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in 50 states and Puerto Rico representing more than 4.9 million member families. Farm Bureau has par-

ticipated as an amicus curiae in many cases involving issues of importance to its members in the U.S. Supreme Court and the courts of appeals, including issues arising under the Clean Water Act.

American farmers and ranchers own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fibre and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether. The protection of wetlands is one of the more serious problems production agriculture faces today.

Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, regulates "the discharge of dredged or fill material into the navigable waters at specified disposals sites." From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a very controversial, complex and contentious program. Its application and misapplication to farms and farming have played a key role in its evolution.

One of the more problematic aspects of the Section 404 program is the uncertainty as to what are jurisdictional wetlands. The U.S. Army Corps of Engineers (Corps) has taken the most liberal of stances on the issue and has attempted to exert Section 404 jurisdiction over virtually any and all wetlands, including isolated wetlands that are not in any way connected to any other waters.

Farm Bureau and its farmer and rancher members have a direct interest in the outcome of this case. The Corps' assertion of jurisdiction over isolated wetlands, particularly under their expansive migratory bird rule, threatens to bring millions of acres of agricultural land within the Corps' regulatory sphere. What was conceived as an anti-pollution statute has been effectively stretched into a national land-use zoning act.

The last thing farmers and ranchers need, at what is already a time of economic crises in the industry, is another layer of unwarranted regulation to drive up their costs of doing business, entangle them in endless red tape, and prevent them from using their land in the most productive way possible.

For the reasons stated above, Farm Bureau respectfully requests that the Court grant Farm Bureau's motion for leave to file this brief amicus curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF THE PETITION

The American Farm Bureau Federation respectfully submits this brief as amicus curiae.[1]

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Act of the State of Illinois. Farm Bureau was founded to protect, promote, and represent the business,

[1] Counsel for amicus curiae have authored this brief in whole and no other person or entity other than amicus, its members or counsel have made a monetary contribution to the preparation or submissions of the brief.

economic, social and educational interests of American farmers and ranchers. Farm Bureau has member organizations in 50 states and Puerto Rico representing more than 4.9 million member families. Farm Bureau has participated as an amicus curiae in many cases involving issues of importance to its members in the U.S. Supreme Court and the courts of appeals, including issues arising under the Clean Water Act.

American farmers and ranchers own or lease significant amounts of property on which they depend for their livelihoods and upon which Americans rely for food and fibre and other basic necessities. Farmers and ranchers are increasingly becoming subject to restrictive regulations at the local, state and national levels that impair their ability to farm, and, in some instances, eliminate that ability altogether. The protection of wetlands is one of the more serious problems production agriculture faces today.

Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, regulates "the discharge of dredged or fill material into the navigable waters at specified disposals sites." From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a very controversial, complex and contentious program. Its application and misapplication to farms and farming have played a key role in its evolution.

One of the more problematic aspects of the Section 404 program, is the uncertainty as to what are jurisdictional wetlands. Thus far, this Court, in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), has determined only "navigable" and "adjacent wetlands" to be jurisdictional wetlands under the CWA. By the way of a footnote, this Court left open the question of jurisdiction over wetlands that are "not adjacent to bodies of open waters." 474 U.S. at 132 n.8.

The U.S. Army Corps of Engineers (Corps) has taken the most liberal of stances on the issue and has attempted to exert Section 404 jurisdiction over virtually any and all wetlands, including isolated wetlands that are not in any way connected to any other waters. The Corps has defined "waters of the United States" to include not only navigable waters, tidal waters and waters adjacent to such waters, but also:

> [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, praire potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce . . . .

33 C.F.R. § 328.3(a)(3) (1998).

The Corps further defined these "other" waters in the preamble to regulations promulgated in 1986 to include waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines . . . .

51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

The Corps' assertion of jurisdiction over isolated wetlands, particularly under their expansive migratory bird rule, threatens to bring millions of acres of agricultural land within the Corps' regulatory sphere. What was conceived as an anti-pollution statute has been effectively stretched into a national land-use zoning act.

The last thing farmers and ranchers need, at what is already a time of economic crises in the industry, is another layer of unwarranted regulation to drive up their costs of producing food and fibre, entangle them in end-

less red tape, and prevent them from using their land in the most productive way possible.

Amicus curiae, Farm Bureau, urges this Court to grant certiorari in this case. Private property owners, especially farmers and ranchers who own the bulk of the lands in this country upon which wetlands and potential wetlands are to be found, are in desperate need of this Court's clarification of what are jurisdictional "non-adjacent" wetlands under Section 404 and to specifically address the question of the Corps' authority to regulate isolated wetlands under its migratory bird rule.

ARGUMENTS

I. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE A CONFLICT AMONG CIRCUITS OVER THE CORPS' AUTHORITY TO REGULATE ISOLATED WETLANDS

The courts of appeals have split in their decisions over the extent of the Corps' authority to regulate "other waters . . . the use, degradation or destruction of which could affect interstate commerce" under 33 C.F.R. § 328.3(a)(3), particularly as to the furthest stretch of the Corps' assertion of jurisdiction under the migratory bird rule.

In this case, the Seventh Circuit upheld the authority of the Corps to assert regulatory jurisdiction over isolated wetlands under the migratory bird rule. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999) (*SWANCC*). The Seventh Circuit rejected arguments that the migratory bird rule violates the Commerce Clause (CONST. art. I, § 8) and exceeds CWA authority. In so doing, the Seventh Circuit placed itself in conflict with the decision of the Fourth Circuit Court of Appeals in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) which

invalidated 33 C.F.R. § 328.3(a)(3) as beyond the Corps' statutory authority under the CWA as limited by the Commerce Clause to regulate "navigable" "waters of the United States."

As a result, there currently exists disparate wetland regulations for property owners in the five states of the Fourth Circuit versus the owners of property in the other forty-five states of the nation. While the Corps has attempted to mitigate the impact of the *Wilson* decision in its *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson* (May 29, 1998), it remains that the Corps must make a more substantial showing of a nexus with interstate commerce to exercise Section 404 regulatory authority over isolated wetlands in the states of the Fourth Circuit than the glance of a goose as is the case in the remaining forty-five states.

Such disparate regulation of wetlands among the states as a result of the conflict of the decisions of the Fourth Circuit and the Seventh Circuit over the scope of the Corps' jurisdiction under the CWA is untenable. Private property owners are entitled to consistent treatment under the CWA throughout the country. This Court should, therefore, grant certiorari.

II. THE CORPS' ISOLATED WETLAND REGULATION AND MIGRATORY BIRD RULE EXCEEDS ITS AUTHORITY UNDER THE CWA AND VIOLATES THE COMMERCE CLAUSE

The Fourth Circuit's analysis in *Wilson* leaves no doubt that the Corps' isolated wetlands regulation, 33 C.F.R. § 328.3(a)(3), exceeds its authority under the CWA and violates the Commerce Clause:

> This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are

intrastate nonnavigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, not that the covered waters have any sort of nexus with navigable, or even interstate, waters . . . . Absent a clear indication to the contrary, we should not lightly presume that merely by defining "navigable waters" as "waters of the United States," 33 U.S.C. § 1362(7), Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner. Even as a matter of statutory construction, one would expect that the phrase "waters of the United States" when used to define the phrase "navigable waters" refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters. When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines "waters of the United States" to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase "waters of the United States" beyond its definitional limit.

Wilson at 257.

Unbelievably, the Seventh Circuit attempted to reconcile its decision in *SWANCC* with that of the Fourth Circuit in *Wilson* by reasoning that upholding the migratory bird rule did not conflict with declaring the isolated wetland regulation itself invalid. *SWANCC* at 852. The fact of the matter is, *Wilson* is directly at odds with *SWANCC*.

Further, Justice Thomas has questioned the validity of the migratory bird rule in his dissent from the denial of certiorari in *Cargill, Inc. v. United States*, 516 U.S. 955 (1995). As Justice Thomas so aptly stated, it "raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the

Clean Water Act." Referring to the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), he observed that actual or potential presence of migratory birds as "[t]he basis asserted to create federal jurisdiction over petitioner's land" is "even more far fetched than that offered, and rejected, in *Lopez*." *Cargill* at 957-958. Justice Thomas concluded that the migratory bird rule "stretches Congress' Commerce Clause powers beyond the breaking point." *Id.*

The Corps' regulation of isolated wetlands, particularly under the migratory bird rule, is controversial and unsettling for property owners, particularly farmers and ranchers upon whose lands an estimated 99 million acres of potential jurisdictional wetlands are believed to exist. See H.R. Report No. 99-271, Part 1, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Ad. News 1103, at 1188 and 1190 (Swampbuster provisions of the Food and Security Act of 1985 intended to slow the conversion of remaining wetlands). Thus, there is a desperate need of this Court's clarification of what are jurisdictional "non-adjacent" wetlands under Section 404 and to specifically address the question of the Corps' authority to regulate isolated wetlands under its migratory bird rule.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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